UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER, Plaintiff, v. RICHARD A. RIMMER, Acting Director of the California Department of Corrections, and JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California, Defendants.	Case No. 04-99001 **DEATH PENALTY CASE** **EXECUTION IMMINENT: Execution Date February 10, 2004**

APPELLANT'S REPLY BRIEF

APPEAL FROM DENIAL OF TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Mr. Cooper moved for a temporary restraining order within weeks of his method of execution being determined. The basis for his motion was that, upon research and consultation with the medical expert community, California's Procedure 770, the lethal injection protocol, was likely to cause him an excruciatingly painful death. More than anything else, this argument arose from a review of the protocols themselves, and what is actually happening in the execution chamber, as best it can be determined given the scant amount of information the Defendants have made available.

Mr. Cooper's motion was denied by the District Court for two reasons: Mr. Cooper's delay in bringing the claim, and the court's determination that he is unlikely to prevail on the merits. In both instances, the court below abused its discretion by applying an incorrect legal standard, basing its decision on a clearly erroneous finding of fact; and misapplying the Eighth Amendment standard governing this challenge. Mr. Cooper appealed and requested a stay of his execution to hear the merits.

Defendants oppose the Motion for Stay of Execution by raising unsupported arguments and failing to address the appropriate standards

governing this case. Their argument beginning as it does on page 14 of its brief, is basically that regardless of the amount of time Mr. Cooper's claim has been ripe for review, it is delayed because twenty years have passed since the crime, and should therefore be barred; and, that Mr. Cooper's claim is like all the others that have been rejected because lethal injection does not violate the Eighth Amendment. Respondent's argument, filled with unhelpful hyperbole, is simply incorrect.

ARGUMENT

I. There Has Been No Delay Sufficient to Bar Mr. Cooper's Claim

In the District Court, Mr. Cooper presented several arguments to meet the defense of delay. Among them was that the claim was not ripe for review until recently, at the earliest when he received his execution date on December 17, 2003. (E.R. at 394.) The District Court never addressed the argument, only holding that the "alleged ripeness bar" to the earlier presentation of his claims did not establish "cause" under *Gomez v. United States District Court*, 530 U.S. 653 (1992). (E.R. at 10.)

Mr. Cooper raises it anew here as it is dispositive of the asserted defense of undue delay. Specifically, the court below abused its discretion by not first determining when Mr. Cooper could actually have

brought this action before holding that it was in any fashion delayed. The court below further abused its discretion by failing to address the nature of "cause," which is generally considered as some impediment external to the defense. All respondent can muster is a misleading assertion that Mr. Cooper somehow failed to raise this argument below, which is simply incorrect. (Opposition, at 3 n.2; Opposition, at 16 n. 4.)

Respondent knows full well that Mr. Cooper's ripeness argument is dispositive, and failed to inform the court below and this court of that fact. In fact, it was respondent's same counsel, Dane Gillette, who appears on these papers and appeared in the court below, who was the one to assert this ripeness argument in *Fierro* as a method of barring relief until the inmate has either chosen the method of execution or it has been made for him. *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1999). Mr. Gillette's argument was the very reason the Supreme Court remanded *Fierro* to this Court and the very reason this Court held the section 1983 action was premature.

Aside from the propriety of state officials failing to inform courts of dispositive law they crafted, and then failing to inform this Court that the argument was raised below, Defendants are without clean hands and may not raise a delay argument here. At the most, Mr. Cooper had 45

days in which to bring suit. In fact, Defendants were on notice from Mr. Amidon's letter in October 2003 that such an action was at least contemplated by him at that time, and they did nothing to assure the claim could be presented in a more timely fashion or prevent the use of an unconstitutional method of execution. *Fierro v. Terhune* precluded Mr. Cooper's lawsuit until the method of execution was chosen, which under California law was not until December 29 or 30, 2003.

Respondent's other argument is that Mr. Cooper could have brought this matter in a habeas proceeding somewhere along the way. (Opposition, at 15-16.) This argument, though, is merely a reprise of the previously rejected assertion that lethal injection claims cannot be brought as section 1983 actions. This court has determined that such civil rights lawsuits are the method by which prisoners can attack lethal injection procedures, much like prisoner suits against any other civil rights violation associated with their confinement or medical treatment. *Fierro v. Gomez*, 77 F. 3d 301, 305-306 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996). That is what Mr. Cooper has done.

The remainder of Defendants' delay argument is nothing more than a recitation of cases in which lethal injection claims have been raised and rejected (for whatever reason), as if that means Mr. Cooper should

have brought his earlier (Opposition, at 16-17), a point already addressed herein.

As to the other factors cited by Mr. Cooper, the court below further abused its discretion by considering legal support for Mr. Cooper that had nothing to do with his representational situation and could in no way further his ability to bring suit even if he could have brought suit prior to late December. (E.R. at 10.) As this Court is well aware, there are various legal agencies designed to assist appointed counsel in capital cases, and occasionally experienced capital counsel who are willing to step forward to advise less-experienced capital litigators. Regardless of the advice provided to appointed counsel, it is appointed counsel who must implement that advice and protect the client's interests. Here, when it became apparent appointed counsel could no longer litigate Mr. Cooper's case, and had not properly done so for some time, new counsel was found who were willing to and did provide the representation he needed. They brought this action as soon as possible given the very untenable situation they were placed in by the state courts.[1] Certainly, Mr. Cooper, who is indigent, could not have been expected to bring his lawsuit any time

[1] Defendant's citation to a typographical error in Mr. Cooper's brief to the effect that unless clemency is granted, he will be executed is sheer

sooner.

The district court further abused its discretion when it held that *Gomez* applied even though the court determined on the record that there had been no manipulation of the judicial process. (E.R. at 406, 418.) This is a threshold showing under *Gomez*, and one that, given the facts here, cannot be established. Defendants' argument to the contrary misses the mark, and never identifies when they think Mr. Cooper should have filed. (Opposition, at 17-22.) Whatever the AEDPA has to do with Mr. Cooper's lawsuit, it cannot act to prevent it here. Even if it were to somehow "inform" the litigation, there are ample provisions within AEDPA that allow for claims or evidence to be presented when the petitioner has shown that they could not have been presented earlier. See 28 U.S.C. §§ 2244 (b); 2254(e). Here, as already explained, Mr. Cooper could not have brought this claim any earlier as the state had precluded him from doing so under the law as it now stands in the Circuit. When the state court's refusal to allow new counsel, and previous counsel's failings are considered, there is really no credible argument that Mr. Cooper did not move fast enough.

(footnote continued from previous page)
desperation. All it shows is that the drafting was being prepared on a Friday, and was filed on the next Monday.

Finally, the district court abused its discretion by relying on the Defendants' oft-repeated citations to stay orders by the Supreme Court. Like Defendants, the district court inexplicably and unreasonably divined that such stay orders are a clear direction to the federal courts that stays should not be entertained unless there are exceptional circumstances. (E.R. at 10.) This was an error of law. Supreme Court orders such as those vacating stays or denying stay motions have no precedential effect. *Barefoot v. Estelle*, 463 U.S. 880, 907 n. 5 (1983). The reasons for this is that we have no idea why the Supreme Court has granted two stays of execution concerning lethal injection, and has denied the others. The underlying certiorari grant in that case was on a procedural issue (present in this case). It is simply too speculative a basis upon which a court can craft a standard of review when evaluating the nature of stay motions pertaining to lethal injection claims.

Perhaps if the state is concerned about the posture of such claims it will modify its regulations to require a choice of execution much earlier, such as upon the denial of the automatic appeal. It will not, however, because it wishes to foreclose such challenges until the last minute, when counsel and the inmate are stretched with a great deal of litigation and efforts towards clemency. The state has made this choice –

they must now live with it.

II. The Showing By Mr. Cooper Is A Sufficient Showing On The Merits So As To Require A Stay Of Execution

The District Court evaluated the merits of Mr. Cooper's claims, not by determining if there was a sufficient showing so as to maintain the *status quo*, but by evaluating the claims based on whether or not they would ultimately prevail. This was an error of law.

Mr. Cooper's showing is very different from those in the cases cited by Defendants. In none of those was there such uncontested proof that the execution procedure was resulting in mishaps and agony. As it turns out, some of Mr. Cooper's best evidence is Defendants' experts who opine that the entire execution process should be complete within four or five minutes. (Exhibits in Support of Opposition, Ex. D at 2, ¶ 4.) That is not what is happening in California, not by any means.

The District Court and the Defendants assume that Mr. Cooper is challenging the lethal injection process. (Opposition, at 25-27; E.R. at 4-5.) That is not what Mr. Cooper is alleging and that was not the issue before the District Court. Mr. Cooper is alleging that Procedure 770 is unconstitutional because it is prone to misuse and error, and that such is in fact occurring. It speaks volumes that neither the Defendants nor the

Court ever addresses this core argument.

The Defendants' next argument is that there is no risk of a painful death because the initial drug is sufficient to render any human being unconscious. (Opposition, at 28-30.) The court below also credited this argument in denying Mr. Cooper's lawsuit. (E.R. at 12.) But, again, this argument does not address Mr. Cooper's complaint. There is really no question that 5 grams of sodium penthonal, properly stored, mixed, and administered, would be sufficient to render a person unconscious. The claim and the evidence presented in support of the TRO was that this is not occurring in California. These contentions and offers of proof are uncontested below and deemed admitted.

It matters not what other courts have held when faced with generic, facial challenges to lethal injection, or unsupported assertions that the procedure is too vague and likely to fail, or that the chemicals themselves are cruel and unusual. Such cases constitute the vast majority of Defendant's string citations. What matters are the allegations and proofs offered in this case, which are uncontested.

Defendants do not even attempt to defend Procedure 770 and its multiple and various flaws. They offered no justification for this ad hoc process, or any qualifications of those involved beyond vague descriptions

of nurses. There is nothing about why they have altered the injection site, and on what basis they believe it will still function properly. At the most, they quote a doctor in one of the Florida cases to the effect that lethal injection is a simple process. Even San Quentin's own Wardens say otherwise (E.R. at 54-55¶ 31), not to mention the eyewitness accounts and records of two executions in California wherein this was painfully untrue.

When Defendants finally address Procedure 770's flaws, all they can say is that it is speculation to assume those flaws cause any interruption in unconsciousness. (Opposition, at 32-34.) Each one of these arguments rests upon the assumption that Mr. Cooper will receive five grams of sodium pentothal immediately and without interruption or incident, including the dispute between the experts as to whether a continuous line should be applied to ensure adequate sedation, and the dispute as to the effects of pancuronium bromide. This assumption, adopted by the court below, is unfounded and is contradicted by the reports and opinions offered by Mr. Cooper.

All the Defendants can offer about the proof presented is that the protocol does not eliminate all possibility of human error. (Opposition, at 34-35.) That, however, begs the question of whether Procedure 770 unnecessarily elevates that possibility into a real

probability, one founded on experience and medical review. The real question is whether there is such error and why. Mr. Cooper has offered sufficient allegations and proof to justify an answer.

Defendants further cite to clearly inapplicable case law and their own expert declaration in an attempt to assert that the evidence of California's botched executions is insufficient. (Opposition, at 35-36.) The citation to their expert opinion is misleading, however, because the expert merely assumes that all the sedative is reaching the inmate immediately, an assumption that apparently is not true. What Defendants' expert did not do is look at Procedure 770, examine the medical logs, and review the eyewitness accounts. Without those, the expert's opinion is meaningless.

In *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997), this Court rejected a challenge to lethal injection in Arizona based on experiences in other states. The challenge said nothing about the Arizona procedure. *Id*. Of course, this is decidedly different from the case here. Likewise, in *LeGrand v. Stewart*, 133 F.3d 1253, 1264-65 (9th Cir. 1998), the petitioner used out of state executions as evidence, but supplemented it with witnesses to two of Arizona's lethal injection executions wherein there were no observed flaws. That was an insufficient showing. Here, by

contrast, Mr. Cooper has presented not only eyewitness accounts and medical reports that contradict Defendants' own experts assumptions, but an opinion based on those accounts. (E.R. 128-34.) Without discovery and testimony, it is really improper to expect anything more. Unfortunately, that is exactly what the District Court did.

One final note is worth mentioning. Defendants argue that animal euthanasia practices are irrelevant to the evolving standards of human decency. (Opposition, at 34 n. 16.) That cannot be true. It cannot be that our evolving standards of decency permit execution of human beings in a manner that is inappropriate for animals. Also of note in this debate is that the animal euthanasia debate occurred in the open scientific and medical environment, where normal procedures were used to determine how what is essentially a medical process should be accomplished. This is a far cry from development of Procedure 770. There has been no scientific rigor attached to the process, certainly not one which would satisfy the standard for introduction of expert testimony in a judicial proceeding. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The results of this ad hoc creation of California's execution "protocol" has been to subject California death-row inmates to unnecessary and excruciating pain.

III. The Violation Of Mr. Cooper's Right To Due Process Of Law

Defendant can only assert that it was satisfactory for the Warden to travel to Texas and meet with officials there to determine the lethal injection protocol. Mr. Cooper has offered a host of state laws and regulations this violated, including the total lack of input from the medical community, or the public in general. That is sufficient for a due process violation.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order, grant a stay of execution and remand the matter to the district court for further proceedings.

Respectfully submitted,

February 8, 2004

/s/(permission to file electronic signature)
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CERTIFICATE OF COMPLIANCE TO FED. R. APP. P. 32(A)(7) AND CIRCUIT RULE 32-1

I, Lisa Marie Schull, certify that:

Pursuant to Ninth Circuit Rule 40-1(a), the attached Reply Brief on Appeal is proportionately spaced, has a typeface of 14 points or more and contains 2,839 words.

Dated: February 8, 2004

/s/ (permission to file electronic signature)
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